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NO. 1001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BRYANT PILEDGE LONG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Bryant Piledge Long, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above captioned case on November 10, 1967.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is unreported and is printed in Appendix A hereto, *infra*, pp. 14 and 15.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra*, p. 15) was entered on November 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the action of an informer paid by agents of the United States Government in carrying upon his person an electronic transmitting device which had been furnished and attached to him by those government agents, in combination with the actions of those agents in attaching such device which was carried by the informer upon the premises of the Petitioner, so that conversations between Petitioner and informer were overheard by means of this device transmitting to a radio receiver in a car occupied by the agents across the street but in the vicinity of Petitioner's business constituted an unreasonable search of and seizure from the person and premises of the Petitioner in contravention of his rights to be free from unreasonable search and seizure under the Fourth Amendment to the Constitution of the United States.

2. Whether the testimony of two government agents who overheard conversations between the Petitioner and a paid informer of the Government by means of an electronic transmitter which they had placed upon the informer and which transmitted to a radio receiver in a car occupied by the agents in the vicinity of the place of business of the Petitioner should have been excluded on a motion to suppress and upon proper objection at trial because obtained by means of an unreasonable search and seizure in violation of rights guaranteed to the Petitioner by the Fourth Amendment to the Constitution of the United States.

3. Whether the use of electronic transmitting and listening devices as outlined in Questions 1 and 2 above without first procuring authority to do so upon a showing of probable cause before a duly constituted magistrate, when the record of trial indicates ample time was available to obtain such authority, constituted an illegal search and seizure of the

Petitioner's person and property in violation of rights guaranteed to him under the Fourth Amendment to the Constitution of the United States.

4. Whether the actions of the governmental agents and their paid informer as outlined in Questions 1 and 2 above were in violation of the rule of the Federal Communications Commission 31 F.R. 3400 March 4, 1966, forbidding electronic recording of a conversation, unless all parties thereto agree, by means of a radio or wire device; and if such actions are so forbidden, because not conducted under lawful authority, whether evidence obtained thereby should be excluded in a criminal proceeding as a means of disciplining Federal investigative authorities.

5. Whether the admission into evidence of incriminatory conversations between the Petitioner and a paid informer of the Government, which were overheard by United States Government agents by means of an eavesdropping device in the form of a concealed transmitter on the informer as described in Questions 1 and 2 above violated the Petitioner's right not to be compelled in any criminal case to be a witness against himself as guaranteed by the Fifth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Constitutional provisions and Statutes involved are:

Amendment IV.

Amendment V.

Rule of Federal Communications Commission, 31 F.R. 3400, Mar 4, 1966, 47 C F.R. §15.11 at p. 301.

They are printed in Appendix B, *Infra*, p. 16.

STATEMENT

This cause was commenced by indictment filed September 7, 1966, in the Eastern Division of the Middle District of Alabama of the United States District Court, wherein the defendant, Bryant Piledge Long, was charged with unlawfully selling seven gallons of whiskey without the containers being stamped with a proper stamp evidencing determination of the Internal Revenue Tax imposed thereon or indicating compliance with the provisions of Chapter 51 of Internal Revenue Code. The offense charged is that which is denounced by the provisions of Title 26 U.S.C. 5604(a)(1).

To this indictment the defendant entered a plea of "not guilty" (R. 152). Immediately prior to this plea (R. 151) defendant had made a motion for a bill of particulars. This motion is set out in full on R. 3. The bill of particulars is at R. 3 and R. 4, in response to order made by the Court requiring the Government to particularize except as to Request No. 5 (R. 152). The Request No. 5 was as follows: "5. The persons present at said alleged sale." (R. 3).

The evidence for the United States was: James H. Jones, an undercover employee of the Alcohol and Tobacco Tax Unit of the Internal Revenue Service had one or more conversations with the defendant, Long, at which time he, Jones, made arrangements to purchase whiskey from defendant (R. 15). Subsequently, Jones went to Long's place of business, where defendant told him to follow him (Long) to where there were seven gallons of whiskey (R. 17). He did follow defendant to a house where they loaded seven gallons of whiskey in the witness' car. Jones then paid defendant for it. (R. 18) Mr. Lloyd Cantrell, a deputy sheriff of Muscogee County, Georgia, then testified (R. 30), including testimony, over defendant's objection, as to a conversation between defendant and Jones (R. 32-33). This

conversation was transmitted by an electronic transmitting device attached to Jones which Cantrell listened to over a receiver. As a result of hearing this conversation, he followed Jones and defendant and saw them load glass jugs into Jones' car (R. 35). He followed Jones back into Georgia, examined the car trunk and found seven gallons of unstamped moonshine whiskey (R. 36-37). The U.S. then called Mr. John E. Walters, Treasury Department Officer (R. 43). Mr. Walters largely corroborated Cantrell's testimony. He also testified about the use of the listening devices employed by the Government agents (R. 45). The admission of conversations recorded by this instrument was again objected to by defendant (R. 47), but the objection was overruled by the Court. Walters also testified that he saw the liquor transaction take place within one hundred feet of him but made no arrest at that time (R. 54).

Rufus McCrary, a witness for the defendant, stated that he saw the Government's witness Jones on four occasions at Long's place of business (R. 73-75) and that on all but one occasion Jones asked defendant if he had anything and on each occasion defendant said he did not (R. 76). The testimony of one Sanford Linton was to the same effect (R. 82). Elise Wiggins testified for defendant that Jones came to Long's place of business at least four times (R. 87). She also testified that Mr. Long never left his place of business with Jones (R. 87). The defendant testified on his own behalf that Jones came to his place of business, The White Swan Cafe, some five or six times and tried to buy whiskey (R. 95) but that defendant told him that he did not have whiskey connections (R. 96). This type of incident was repeated several times (R. 96). Mr. Long also testified that he never went to 27th Street on the occasion of the alleged sale, that he owned no property there and that he knew no one there (R. 100).

The defendant made a motion to suppress the evidence on the major ground that the case of the Government rested largely on the use of a listening device, without the knowledge and consent of defendant (R. 6). Motion for acquittal was also made (R. 5, 6), largely on the same grounds. The Court did not grant either the motion to suppress or the motion for acquittal.

The Court of Appeals affirmed the judgment in the United States District Court on November 10, 1967. Defendant's counsel in the District Court proceedings and on the appeal to the Fifth Circuit Court informed defendant that they could not represent him in proceedings before the United States Supreme Court because counsel was not admitted to practice there. Defendant then engaged other counsel who was advised by letter dated November 22, 1967, that his motion for a stay in issuance of the mandate had been granted from November 10, 1967, and that defendant had thirty days from November 10 to file a petition for writ of certiorari. Defendant was advised by his then counsel on December 13, 1967, of receipt of this information and that the time for filing of petition had expired. On December 18, 1967, Defendant engaged present counsel to review his case with a view to filing this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The petitioner, by a motion to suppress the evidence of the two law enforcement officers as to what they overheard defendant say to their informer, Jones, by his timely objection at the trial, and by his brief before the United States Court of Appeal, Fifth Circuit, urged that testimony concerning such conversations obtained by such a means violated the defendant's rights to be protected against an unreasonable search and seizure as proscribed by the Fourth Amendment to the Constitution of the United States.

Two points are admitted at the outset. First, petitioner's counsel did not file his petition for writ of certiorari within the time required by Rule 22, Rules of the Supreme Court of the United States, nor did he request an extension within thirty days of the judgment below. Second, the case of *On Lee v. United States*, 1952, 343 U. S. 747, 96 L. Ed. 1270, 72 S. Ct. 967, appears to be clear authority for the decision and judgment of the Fifth Circuit Court of Appeals affirming the judgment below. However, subsequent to the decision of the Fifth Circuit on November 10, 1967, and subsequent to the expiration of the thirty days provided for in Rule 22, supra, the Supreme Court of the United States on December 18, 1967 decided the case of *Katz v. United States*, 36 Law Week 4080. In this case the majority of the Court expressly overruled *Goldman v. United States*, 1942, 316 U. S. 129, 86 L. Ed. 1322, 62 S. Ct. 993; and *Olmstead v. United States*, 1928, 277 U. S. 438, 72 L. Ed. 944, 48 S. Ct. 564, by holding that a physical penetration is not a necessary element of an illegal search and seizure by use of an electronic listening device. The Circuit Court's opinion, Appendix A, relies specifically upon *Goldman v. United States*, supra, p. 7; and *Olmstead v. United States*, supra, p. 7. Its opinion also notes that in *Silverman v. United States*, 1961, 365 U. S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679, the Supreme Court explicitly pointed out that *On Lee*, *Goldman*, and *Olmstead* were still applicable except where "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners". The Circuit Court then cited for this proposition *Katz v. United States*, 9 Cir. 1967, 369 F. 2d 130, cert. granted, 87 S. Ct. 1021, the very case in which this Court held that *Goldman*, supra, p. 7, and *Olmstead*, supra, p. 7 were overruled. A re-reading of *On Lee v. United States*, supra p. 7, establishes that it was a five to four decision in which the majority relied heavily upon *Goldman* and *Olmstead*. This is clear from the dissent of

Mr. Justice Douglas at 343 U.S. at p. 762, in which he said that he believed that *Goldman* was wrong and that the Court should reconsider that holding in reversing On Lee's conviction.

Because the Court of Appeals for the Fifth Circuit so bluntly based its decision upon *On Lee*, supra p. 7; *Goldman*, supra p. 7; and *Olmstead*, supra p. 7, while referring to *Katz*, 369 F. 2d 130, as recent authority; because this Court, only recently and subsequent to the Circuit Court's decision and after time had expired for a petition for writ of certiorari to be filed by this Petitioner, decided *Katz v. United States*, supra, p. 7, overruling *Goldman* and *Olmstead*, the foundation-stone cases of *On Lee*, this Court should review this Petitioner's case and determine whether *On Lee v. United States*, supra p. 7 is controlling in cases of this sort or should be overruled.

2. To reverse *On Lee v. United States*, supra p. 7, will not place an undue burden upon law enforcement agencies if the Court spells out what procedures should be followed to obtain authority for electronic eavesdropping and surveillance. Two cases, *Katz v. United States*, supra p. 7, and *Osborn v. United States*, 1966, 385 U. S. 323, 17 L. Ed. 2d 394, 87 S. Ct. 429, show the way. In the more recent of these cases Mr. Justice Stewart, speaking for the Court, gave the answer to those who contend that a rule forbidding the use of such devices except in certain circumstances will unduly hamper law enforcement when he said in 36 Law Week at 4082:

> "Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could con-

stitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the . . . allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' *Osborn v. United States*, 385 U. S. 323, 329-330. Discussing that holding, the Court in *Berger v. New York*, 388 U. S. 41, said that 'the order authorizing the use of the electronic device' in Osborn 'afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence.' Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' Id. . at 57. Here, too, a similar judicial order could have accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance."

Such a procedure was followed in Osborn's case, which demonstrates that careful, conscientious, and skillful law enforcement can achieve its ends while still protecting the individual against arbitrary and indiscriminate invasion of his right not to have the Government's agents, at their unbridled discretion, listening to his private conversations. There is no substitute for the impartial magistrate who can determine whether the Government should be permitted to listen in on individual citizens' private conversations.

3. The next important issue involves the use of a coerced or paid informer or a disguised Government agent in either recording or transmitting to other agents a conversation

between the defendant and the informer or agent which the defendant had reason to believe was private and confidential. It has been said that when one man speaks to another he takes all the risks ordinarily inherent to doing so, including the risk that the man to whom he speaks will make public what he heard. *Hoffa v. United States*, 1966, 385 U. S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408. It also has been said that for this reason he has no right to complain if the disguised agent or informer records what he says. *Osborn v. United States*, 385 U. S. 323. In this connection it should be pointed out that in *Hoffa*, supra, the trial judge found that the individual had not been placed by the Government in the confidence of the defendant as is made clear in the concurring opinion of Mr. Justice Douglas. In *Osborn*, supra, the law enforcement officers had presented an affidavit to two United States District Judges showing reasonable cause why their informant should have been permitted to record the private conversations between him and Osborn. Even with that safeguard one member of the Court dissented. The leading case relied on for this kiss and tell proposition is *Lopez v. United States*, 1963, 373 U. S. 427, 10 L. Ed. 2d 462, 83 S. Ct. 1381; but that case, which once again was decided by a divided Court, is really no authority for such a general rule. The so-called informant was an Internal Revenue agent who openly appeared as such but to whom the defendant had without prior encouragement paid a bribe. The agent naturally reported this to his superiors, who instructed him to string along with Lopez but to record what took place. It can hardly be said that Lopez had a constitutionally protected right to rely upon a Government employee's keeping silent about the fact that he had been offered a bribe. It is otherwise when the informer presents himself as a friend or as a business associate, when he encourages the defendant toward participating with him in a crime, even if not as a matter of law entrapping him. Yet

at the same time the informer transmits their supposedly private conversations to law enforcement officers who have placed the informer where he is for the express purpose of listening in on what the defendant says in the confines of his home or place of business. The implied consent of the defendant that the disguised informer should share his confidence can hardly be said to include an invitation to broadcast it simultaneously to the world or to invite Government agents to sit in by means of electronic eavesdropping devices. The line between *Lopez*, supra, p. 10, and *Hoffa*, supra, p. 10, may be a fine one; and in turn, that between Hoffa's case on one hand and On Lee's and this petitioner's case on the other; but the fine line is a real one.

4. A further reason for this Court to grant certiorari and review the Petitioner's case is that recent Governmental regulations require that before a conversation can be recorded electronically both parties must agree thereto. 31 F.R. 3400, Mar. 4, 1966. This would appear to forbid the Government's agent or informer's using such a recording or transmitting device whether the Government be considered a party to the conversations through its agent or merely the beneficiary of wrongdoing which its agents have inspired. The Supreme Court has long used its supervisory power over other Federal courts to exclude evidence illegally obtained. See *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341; and *Gouled v. United States*, 1921, 255 U. S. 298, 65 L. Ed. 647, 41 S. Ct. 261. While exercise of this power does not require a finding of unconstitutional governmental action but merely that the evidence sought to be used was obtained by illegal or forbidden means, in Petitioner's case there was eavesdropping which had not been authorized by an independent magistrate. It is important because of this regulation for this Court to decide what the phrase "operations of any law enforcement officers conducted under lawful authority" means.

5. From the dissents by Mr. Justice Holmes and Mr. Justice Brandeis in *Olmstead v. United States*, supra, p. 7, to the present, both majority opinions and dissents have recognized that electronic surveillance and eavesdropping is a "dirty business." All have also recognized that what is personally distasteful is not necessarily either illegal or unconstitutional. The forbidden activity is the unreasonable search and seizure. Once it is recognized that the sophisticated electronic equipment which was foreseen in general, if not in detail, by Mr. Justice Brandeis in his *Olmstead* dissent, can penetrate the privacy of the home or the office without a physical penetration or trespass; once it is recognized that there can be a "seizure" of words by electronic recorders or transmitters and that the premises and persons to be searched and the conversations to be so seized can be described with a high degree of particularity, it can also be seen that before a search and seizure is reasonable it should be passed upon not only by the well-meaning but zealous law enforcement officers, but by an independent magistrate who can assure that good cause is shown. This is the tendency of the opinions dealing with searches and seizures generally and this specific but newly evolving form thereof in recent years: The rule as put forth by the majority in *Katz v. United States*, supra, p. 7, and *Osborn v. United States*, supra, p. 8, would serve the frequently conflicting interests of the Government, on behalf of its citizens, attempting to uncover the wrongdoer, and the rights of that same citizenry as individuals to be free from unreasonable searches and seizures. It is submitted that in both *On Lee v. United States*, supra, p. 7, and in the case at bar, the record shows that the elaborateness of the Government's preparations and the time clearly available permitted the agents, as was done in *Osborn*, supra, p. 8, to go before a magistrate with their information and with their paid informer to make a showing that either a crime was going to be committed or that a crime

had been committed by the named defendant and could be found by permitting such surveillance at a certain time and place. This, we submit, is the proper rule, the proper burden to place upon the Government, which fell short of carrying it in both On Lee's case and Petitioner's.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that I, Edmon L. Rinehart, one of the attorneys for petitioner and a member of the Bar of the Supreme Court of the United States, prior to filing, and upon the 5th day of January, 1968, served four copies of the foregoing Petition for Writ of Certiorari on each of the following: Erwin N. Griswold, Solicitor General, United States of America, Washington 25, D.C., and upon Ben Hardeman, United States Attorney for the Middle District of Alabama at his office in the Federal Building in the City of Montgomery, Alabama, by mailing them in duly addressed envelopes with first class postage prepaid in the United States Post Office at Montgomery, Alabama.

Edmon L. Rinehart

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33 South Perry Street, Montgomery, Alabama
Attorneys for Petitioner

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 24224

BRYANT PILEDGE LONG,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Alabama.

(November 10, 1967.)

Before JONES, WISDOM and DYER, Circuit Judges.

PER CURIAM: The defendant-appellant, Bryant Long, was convicted for unlawfully selling seven gallons of whiskey in unstamped containers in violation of 26 U.S.C. § 5604 (a) (1). The United States introduced, over the defendant's objections, evidence of conversations between Long and a government agent obtained through the use of electronic transmitting and receiving devices. A microphone strapped

to the agent transmitted the conversations to other agents. Long contends that the use of electronic eavesdropping devices is unconsitutional and that evidence resulting from such devices is inadmissible.

There is no merit to Long's contention. *Lopez v. United States*, 1963, 373 U. S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462; *On Lee v. United States*, 1952, 343 U. S. 747, 72 S. Ct. 967, 96 L. Ed. 1270; *Goldman v. United States*, 1942, 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322; *Olmstead v. United States*, 1928, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944; and *Beatty v. United States*, 5 Cir. 1967, F. 2d (No. 23226, May 2, 1967). In *Silverman v. United States*, 1961, 365 U. S. 505, 81 S. Ct. 679, 5 L. Ed. 734, the Supreme Court explicitly pointed out that *On Lee*, *Goldman*, and *Olmstead* were still applicable except where "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners". See also *Katz v. United States*, 9 Cir. 1967, 369 F. 2d 130, cert. granted, 87 S. Ct. 1021. No physical "intrusion" or "penetration" was involved in this case. See *Jones v. United States*, 5 Cir. 1964, 339 F. 2d 419.

The judgment is AFFIRMED.

APPENDIX B

Constitution of the United States:

Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule of The Federal Communications Commission 31 FR 3400, Mar 4, 1966

a. No person shall use, either directly or indirectly, a device operated pursuant to the provisions of this part for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation.

b. Paragraph (a) of this section shall not apply to operations of any law enforcement officers conducted under lawful authority.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1001

BRYANT PILEDGE LONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the Middle District of Alabama of unlawfully selling seven gallons of whiskey in violation of 26 U.S.C. 5604(a)(1). On October 21, 1966, he was sentenced to imprisonment for three years. The court of appeals affirmed *per curiam* on November 10, 1967 (Pet. App. A). The petition for a writ of certiorari was not filed until January 9, 1968, and is thus out of time under Rule

22(2) of the Rules of this Court. In any event, petitioner's contentions are without merit.

One James Jones, an informer for the Alcohol and Tobacco Tax Division, testified that on March 9, 1966, he telephoned petitioner and ordered 100 gallons of whiskey. Jones thereafter met petitioner at the White Swan Cafe. Petitioner told Jones that he did not have the 100 gallons, but that he did have 7 gallons. Petitioner then requested Jones to follow him to a house on 27th Street, where Jones backed his car into the driveway. They then loaded seven gallons of "moonshine" whiskey into the trunk of Jones' car, and Jones paid petitioner $56.00 (R. I. 13-19). The actual transfer of the whiskey to Jones' car was observed by Deputy Sheriff Lloyd Cantrell of the Muskogee County Sheriff's Department, and a federal agent, John Walters (R. I. 34-37, 47-49).

After Jones had initially arranged for the purchase, he reported that fact to Agent Walters who equipped him with a transmitting device (R. I. 27-28, 45). By use of this device Sheriff Cantrell heard petitioner say to Jones, as they were leaving the White Swan Cafe to get the seven gallons of whiskey, "Follow me down the road; it's not very far" (R. I. 33). Walters, who was also monitoring the conversations, heard petitioner say, "We'll get in the car and we'll go up the road and we'll get the stuff. I don't have it here" (R. I. 47). These two statements, which corroborated similar testimony given by Jones, were received into evidence over petitioner's objection.

1. Petitioner contends that the trial court erred in admitting evidence of the two monitored statements

which corroborated the earlier testimony of the informer. He does not claim (nor could he) that the trial court erred in receiving the same testimony by Jones, with whom he voluntarily conversed. See *Lewis* v. *United States*, 385 U.S. 206; *Hoffa* v. *United States*, 385 U.S. 293. Thus, his argument is only that the substance of Jones' testimony was impermissibly corroborated by the testimony of the agents.

In *Lopez* v. *United States*, 373 U.S. 427, however, this Court squarely held that when one voluntarily speaks to another, he assumes not only the risk that the auditor may repeat the contents of that communication to others, but also the risk that the communication may "be accurately reproduced in court, whether by faultless memory or mechanical recording," 373 U.S. at 439. This Court has since reaffirmed the principle that what "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, No. 35, O.T. 1967, decided December 18, 1967.[1]

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[1] In his concurring opinion *Katz*, Mr. Justice White observed:

> In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained * * * (2) by a recording device hidden on the person of such an informant, *Lopez* v. *United States*, 373 U.S. 427 (1963); *Osborn* v. *United States*, 385 U.S. 323 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location, *On Lee* v. *United States*, 343 U.S. 747 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will

The transmitting device here employed was not used either to seize evidence otherwise inaccessible to the government, or to obviate the necessity of putting the informer on the stand; it was used only to verify "* * * the truthfulness of the informer and [to protect] his credibility in this fashion." *Hoffa* v. *United States*, 385 U.S. 293, 317 (Mr. Chief Justice Warren, dissenting on other grounds). The transmitting device was used on but one occasion—during the actual commission of the crime which had been anticipated by the agents. In these circumstances, there is certainly no doubt that *Lopez* is controlling.

2. For the first time in this Court, petitioner contends that the use of the monitoring device violated a regulation of the Federal Communications Commission. That regulation, 47 C.F.R. 15.11 provides:

> (a) No person shall use, either directly or indirectly, a device operated pursuant to the provisions of this part for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation.

---

make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates [citation omitted]. It is but a logical and reasonable extension of this principle that a man takes the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another.

In contrast to *Katz* who, the Court found, had justifiably relied upon the privacy of the telephone booth to exclude the "univited ear", petitioner voluntarily assumed the risk that his auditor would consent to the monitoring of those statements.

> (b) Paragraph (a) of this section shall not apply to operations of any law enforcement officers conducted under lawful authority.

See, also, 47 C.F.R. 2.701.

Petitioner asks this Court to construe the phrase, "operations of any law enforcement officers conducted under lawful authority." Under the facts of this case, however, that issue is not reached. The regulations (47 C.F.R. 2.701 and 47 C.F.R. 15.11) apply only to those devices which are subject to regulation by the Federal Communications Commission and by statute (47 U.S.C. 305(a)) all radio devices owned and operated by the United States are exempted from those regulations. Here, the evidence is clear that, the monitoring device was owned and operated by the United States Government, and, this did not come within the FCC regulations.[2]

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[2] There is no merit to petitioner's suggestion, as set forth in his "Questions Presented" (Pet. 3), that the monitoring violated his Fifth Amendment protection against self-incrimination. *Hoffa* v. *United States*, 385 U.S. 293, 303-304.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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